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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HOWARD WAITE, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED (*)

The questions presented are:

1. May misstatements by an agency employee regarding the appeal procedure to be followed by a claimant after an administrative decision be "affirmative misconduct" such as to justify the application of the principle of estoppel to assert the defense of the Statute of Limitations against the Federal Government?

2. May the commencement of the running of the Statute of limitations be deferred on grounds other than estoppel

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*Petitioner submits that this case is a proper case for the issuance of a Writ of Certiorari. As stated in Point 4 of this Petition, the Court of Claims committed reversable error of a type not normally considered on Certiorari, specifically by dismising the Petition in the Court of Claims as matter of law and failing to allow Petitioner to amend his Petition to meet the issues relating to the Statute of Limitations as raised by the United States.

As of October 1, 1982, a new Court, the United States Court of Appeals for

because of mistatements by government officials regarding the appellate procedure to be followed?

3. Did the Civil Service Commission commit reversable error in refusing to consider evidence from the Navy Department and employing officers substantiating the de facto status of Petitioner as a government employee solely because the face of an employment agreement stated that the employee was employed by a private contractor?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding before the Court of Claims. There are no additional parties.

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the Federal Circuit, will be created, (28 U.S.C. Section 1292) which will have appellate jurisdiction over the United States Claims Court. In the event that this Petition for Certiorari is not granted, Petitioner requests that this Court take jurisdiction and remand the case to the United States Appeals Court for the Federal District for further proceedings.

The basis for this request is set forth in point 4 of this Petition.

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OPINIONS BELOW

The opinion of the United States Court of Claims (App. B, p. A-8) is not reported. The Opinion of the Board of Appeals of the Civil Service Commission (App. A, p. A-1) is not reported.

JURISDICTION

The order of the United States Court of Claims (App. B, infra) was entered on March 2, 1982. A Petition for Reconsideration was denied on April 2, 1982. The jurisdiction of the Court is invoked under Section 28 U.S.C. 1255.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 1295:

" (a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction--...(3) of an appeal from a final decision of the United States Claims Court."

Section 403(a), Federal Courts Improvement Act of 1982, Public Law 97-164, 94 Stat. 1994:

"Any case pending before the Court of Claims on the effective date of this Act in which a report on the merits has been filed by a commissoner, or in which there is pending a request for review, and upon which the court has not acted, shall be transferred to the United States Court of Appeals for the Federal Circuit."

No.A-1076

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OCTOBER TERM, 1982

HOWARD WAITE, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Petitioner, HOWARD WAITE, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court Of Claims entered in this proceeding on March 2, 1982.

STATEMENT

When Petitioner retired as an employee of the United States Government he claimed retirement benefits for employment covering the period from May 23, 1947, through April 18, 1968. The Civil Service Commission refused to allow Petitioner credit for claimed service periods from May 23, 1947 through May 1, 1950, and from July 15, 1963, through March 21, 1965. The total service claimed by Petitioner was 21 years and 10 months, while the Commission gave him credit for only 17 years and two months of service.

Because of the Court of Claim's disposition of the case on a Motion to Dismiss prior to the filing of an answer, the record in the Court of Claims is sparce. It is devoid of any facts regarding the actions taked by both the Petitioner and the Commission regarding the representations made by the Commission and the actions taken by the Petitioner in an attempt to comply with the directions continuously given by the Commission. The appendix contains

selected documents from the exchange of correspondence between the parties, which are relevant to the instant Petition. The acts of the Petitioner and the responses of the Commission regarding Petitioner's entitlement to Petitioner's claimed retirement rights are as follows:

Facts regarding "affirmative Misconduct":

When Petitioner's initial annuity was determined upon retirement, Petitioner disagreed with the amount, and inquired of the Civil Service Commmision.[1] He found that he had been given credit for less time than he had worked. Since he had knowledge of the fact that the Commission had taken the position that he was not entitled to the credit for work performed between May 23, 1947, and March 1, 1950, he sent certain aadditional documentation verifying that he was in

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[1] The name of the Civil Service Commission has been changed since the decision. For purposes of this Petition the original name will be retained.

fact a government employee (Letter, October 21, 1969, App. C, p.A-16). This evidence was rejected by the Commission. Letter, January 23, 1970, App.E., p.A-20). He then appealed this denial to the Commission, (Letter, February 20,1970, App. F, p.A-22) and presented certain additional documentary evidence that had been previously described as being required to allow Petitioner credit for such service.

The Commission, acting through the Board of Appeals, refused to reverse the adverse determination, based upon the stated failure of Petitioner to provide the necessary documentation to support his contention that he was appointed to the position he held by a federal officer, and that the contract he signed with a private contractor was signed at the request of, and "for the convenience of the government. " (Decision contained in Appendix A, p. A-1)

Upon receipt of the opinion, Petitioner again forwarded statements by his employing officers, and asked for a rehearing. (Letter, September 4, 1970 App. G, p.A-24) .

His request was denied, and a letter was sent to him that contained two statements regarding the further actions he might take to gain further considertion of his contentions that he was a government employee during the indicated time. This letter, dated January 15, 1971, (App. H, p. A-26) stated unequivocally that the decision of the civil service commission was final, "from which there is no further right of appeal." In addition, the letter contained a statement that informed Petitioner that the Commissioners might, in their discretion, "reopen and reconsider any previous decision" when new evidence was presented or if an erroneous legal determination had been made.

Over the next several years, Petitioner attempted to provide the evidence that the Commission, acting through its employees, continually stated was necessay to, and would give a basis for, a reconsideration of the Petitioner's claim. Petitioner's file contains over sixty documents reflecting a continuous exchange of correspondence

with the Commission.

Finally, on April 3, 1978, Petitioner received a letter (App. X, p.A-56) from the Commission informing him that there was not then, and never had been, any chance that the documentation continuously solicited by the Commission would be considered in his case. By this time the Statute of Limitations had run on the original decision of the Board of Appeals.

When Petitioner filed his petition in the Court of Claims, the government asserted the Statute of Limitations as a Bar in a Motion to Dismiss prior to the filing of an answer. The Motion was granted without leave to amend. (App. B, p.A-8).

Reliance By Petitioner:

a. The Period From May 23, 1947--March 1, 1950:

Petitioner based his claim to entitlement to credit for employment from May, 1947, through March, 1950, on the contention that he was in fact an employee of the Federal government and met the tests for creditable federal employment, even though he was requested

to, and did, sign an employment contract with a private employer for the covenience of the government. Petitioners factual contentions were, and are, supported by written statements of the officers who employed him, and the records of the Department of the Navy. The Navy Department, in a letter to the Civil Service Commission dated April 1, 1971, (App. I, p. A-29) verified the facts underlying Petitioner's employment, stating:

> "Records and information available to this command indicate that on or about 23 May 1947, Mr. Waite was appointed by a Naval Officer to perform work under U.S. Navy supervision. Contract of employment which Mr. Waite entered into with Contractor NOy 13931, and later with Contractor NOy 13626 on 29 September 1947, were effected for the convenience of the government to facilitate Mr. Waite being carried on the contractor's rolls for pay purposes only. Mr. Waite was continuoulsly employed under the supervision of U.S. Navy officials until 1 March, 1950, when he was converted to Civil Service status.

The Civil Service Commisson, in its rulings, recognizes that service performed while on a private contractor's payroll can be creditable service if the employee meets the requisites for being classified as a federal employee. These

tests were articulated in the decision rendered by the Board of Appeals and Review, (App.A, p. A-1), as follows:

> "Civil service retirement credit for contract service depends on whether it meets the three tests of Federal employment. In this connection, in addition to the requirements that a person be engaged in the performance of federal functions under authority of an Act of Congress or Executive Order and be under the supervision and direction of a federal officer, there must be an affirmative showing that an appointing officer of a government department hired the person and placed him on the payroll of a contractor, rather than on the rolls of the government department, for the convenience of the government. Full and complete documentation of these elements is required." (Ital. ours.) (Decision of the Commission, App A., p.A-1)

The Commission did not make a finding against the Petitioner on the merits of his contentions tnat he in fact signed the contract with the employer "for the convenience of the government" and not as a private employee. The findings and decision of the Commission were based on the alleged lack of documentary evidence presented by the Petitioner. In the decision the Commission stated:

> "The only documentation of the appellant's employment consists of the contracts of employment he entered into with the private contractors. The appellant's representations and the statements furnished on his behalf indicate that a federal official authorized the contrator to employ the appellant to fill a particular position. 'Authorization' does not satisfy the requirement that a person be appointed." (App A, p.A-6)

At this point the status of the matter was such that Petitioner justifiably believed that the reason for the denial of his claim for credit was that he did not provide sufficient documentation of the fact of his "appointment" by a federal officer. He then undertook to provide the necessary documentation.

Immediately upon receiving the decision of the Commission, he obtained additional documentation, and provided additional statements from the officers employing him to establish that he had in fact been "appointed" by a federal officer. He requested a reopening of the hearing and the consideration of additional documentation to supply the evidence deemed missing by the

Commission. (Letter, September 4, 1970, App.G, p.A-24). His reappeal was denied, and Petitioner was notified of the denial by a letter dated January 15, 1971 (App.H, p.A-26).

This letter of January 15, 1971, formed the basis for the subsequent actions taken by the Petitoner. In the letter Petitioner was advised that the decision of the Commission's Board of Appeals and Review were final, "from which there is no further right of appeal." Petitioner was not notified of the availablity of a judicial review of the decision of the Commission. However, in the letter Petitioner was advised that on certain conditions the Commission might reopen the decision. In the letter the Commission stated:

> "Decisions of the Commission's board of Appeals and Review are final administrative decisions of the Civil Service Commission, from which there is no further right of appeal. However, it has been provided by regulation that the Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that: (a) New and material evidence is

> available that was not readily available when the previous decision was issued; (b) The previous decision involves an erroneous interpretation of law or regulation or a misappication of established policy; or...." (App H, p.A-26)

After receiving the January 15, 1971, letter, Petitioner attempted to proceed in the only manner open to him as set forth in the letter. He provided additional documentation to provide the documentary evidence the absence of which was the stated basis for the Commission's denial of his service credit. For the following seven years he consistently furnished information and made inquiry as to what form the illusive "documentary evidence" must take. During this time he received constant assurances from Commission representatives that his case could be reconsidered if the proper documentation was furnished. An example is the letter dated March 16, 1972, (App. L, p. A-35) where the Commission acknowledges that service while on a contractor's payroll could be credited for federal service if the tests originally stated in the Commission's decision were met. The writer went on to

state:

> "In order to give further consideration to your request for credit for the service from May 23, 1947 through February 28, 1950, it will be necessary for you to submit three statements in affidavit form attesting to the fact that you were a Federal employee during the period in question. One of the affidavits about your employment must be from you personally. One of the other two affidavits must be from the Resident Officer in Charge, the Area Officer in Charge of construction, or some other Federal Officer having knowledge that you were Federally appointed. An affidavit is a statement of facts confirmed by the oath of the party making it, taken before an officer having authority to administer such oath."

Several exchanges of correspondence took place between the Commission and Petitioner regarding the form and content of the affidavits. For example, one affidavit was returned for notarization (Letter, April 5, 1972, App.N, p.A-).The corrected affidavit was returned by Petitioner. The letter dated July 10, 1973, (App.Q, p.A-42) acknowledges receipt of the affidavits as described by the Commission, but states that affidavits continue to be inadequate to

change the decision of the Commission. The writer states:

> "The affidavits you submitted from Captains Hansen and Gordanier do not specifically show that you were appointed or employed by a Federal officer in his official capacity as such and that you were under the supervision and direction of a Federal officer. The affidavits were substantially the same as those previously submitted and do not furnish any new evidence to show you met the three criteria of Federal employment."

> "Any additional new evidence you wish to submit will be carefuly considered in connection with your claim; however, there is no authority to consider your "contractor" service as Federal employment on the basis of the information now available."

Petitioner was continuously led to believe that if he presented additional evidence to meet the deficiencies in evidence stated by the Commission, the commission would reopen his case and he would obtain a favorable ruling. After presenting numerous modifications to the affidavits, petitioner inquired as to what form was appropriate. In a letter dated December 22, 1976, (App. W, p. A-54) in response to one of Petitoner's numerous

requests, the Commission stated":

> "There is no prescribed wording for the affidavits regarding such service. However, at lease one of the affidavits must be signed by the Resident Officer in Charge; Area Office in Charge of Construction; or other Federal Officer having knowledge that the individual was Federally appointed. A contractor's statement that during the period of employment the claimant was an employee of the Navy or Army and not an employee of the contractor is also admissible evidence.

Petitioner submitted such an affidavit from the contractor, and received a reply that it was "not germaine in establishing Mr. Waite as a government employee during the time in question." (See App.X, p.A-56). The apparent confusion and inconsistency that met every attempt by Petitioner to provide the documentary evidence in the form stated by the commission became clear by the letter of the Commission dated April 3, 1978. (App. X, p.A-56) For the first time Petitioner was informed that all of his previous attempts were futile, and that the "secondary evidence" establishing the actual facts of the

employment was foreclosed by the existence of the written contracts with the private employer. The letter stated:

> "The need for secondary evidence has never existed or been in question in your case. Instead primary evidence (copies of Contracts NOy 13931 and NOy 13636) has been a part of your case file since 1958 and formed the basis of the Commission's original denial letter dated February 26, 1958. This denial of credit has been consistently reaffirmed."

For the first time, in 1978, after the six year statute of limitations had expired, (28 U.S.C. Section 2501) Petitioner was informed that the Commission would not look behind the existence of the contracts that he executed for the convenience of the government. The basis of the Commission's decision was solely on the fact that the fact of the contract designated Petitioner as the employee of the private contractor, and all determinations regarding the actuality of the employment by the government were foreclosed because the face of the contract was determinative.

Petitioner again attempted to gain clarification of the position of the Commission. In response, the commission reiterated (Letter dated October 30, 1978, App.Y, p.A-60) that the documentary evidence Petitioner was led to believe would change the decision of the commission was not considered relevant. The writer stated:

> "The use of the words'the only documentation' in the Appeals Review Board's July 22, 1970, decision referred to the copies of your employment contracts executed many year age [sic](1947). These documents constitute primary evidence of your employment. The affidavits and letters which you have sent to us since your retirement in 1969 are "secondary" evidence and cannot overcome the "primary" evidence (the 1947 contracts contained in your file."

b. <u>The Period From July 15, 1963, through March 21, 1965.</u>

When the original computation of retirement service time was made by the Commission, no itemization was given of the periods of employment which were omitted in computing the Petitioner's

creditable service. Upon receiving the initial determination Petitioner immediately requested that he be furnished with the computations forming the basis of the annuity. (Ltr, January 5, 1970, App. D, p. A-19). In spite of repeted requests, the accounting was not provided until June 11, 1974, when it was finally furnished. (Letter, June 11, 1974, App. T, p. A-48). In the June 11, letter Petitioner was, for the first time, officially notified that he was not being given credit for the period from July 16, 1963, through March 22, 1965.

Petitioner had been employed by Captain Norman M. Martinsen to work in a Civil Service position commencing July 16, 1963. Because of administrative mistakes in the processing of the paperwork, Petitioner was not placed in the proper position on paper, although he was in fact hired for a position which would guarantee him continuous service for retirement purposes.

In support of his claim for credit for this period, to counter the mistakes contained in his personnel record,

Petitioner supplied a letter from the hiring officer, Captain Martinsen, which attested to the actual events underlying the employment of the Petitioner, and the fact that administrative error was the cause of the failure to properly classify the Petitioner. (Letter, March 6,1972, App.K, p. A-31).

This letter was not considered by the Commission.

The balance of the letters contained in the Appendix, and not specifically referred to in this Statement, show attempts made by Petitioner to meet the requests of the Commission. It is apparent that the final decision regarding the reopening of the case was not made by the body making the decision, the Board of Appeals and Review, but was made by an examiner at a low level of the process. (Letter, March 5, 1975, App. U, p. A-50). Thus, Petitioner never received the opportunity to have his additional evidence considered.

After receiving the April 3, 1978, letter (App.X , p.A-56), petitioner again communicated with the Commission to attempt to rectify the situation. Finally he filed a Petition in the Court

of Claims for a determination of his entitlement to retirement benefits. The Government filed a Motion to Dismiss, raising the State of Limitation (28 U.S.C. Section 2501) as a defense. The Court of Claims granted an Order of Dismissal without leave to amend, and the order constitutes a final adjudication on the merits in accorance with the provisions of Rule No. 102(b) of the Rules of the Court of Claims.

REASONS FOR GRANTING THE WRIT

This Petition for Writ of Certiorari presents the issue of when and under what conditions the United States Government may be forclosed from asserting the Statute of Limitations as a defense to a lawsuit arising out of a claim for an entitlement to benefits authorized by Acts of Congress. Since the various entitlement programs constitute approximately 60% of the annual budget, it is essential that a claimant be able to reasonably rely upon the statements and other conduct, both affirmative and negative, of agency officials regarding the processing of a claim if the claimant has furnished proper information to the agency, and has otherwise complied with the requirements for entitlement. To the extent that the claimant is misled or otherwise not properly informed as to the proper procedures to be taken, and reasonably relies upon the actions of the agency personnel, he or she should be entitled to be protected against a bar of the Statute of Limitations.

In actions other than those in which the Government is a party, the lower

courts have established two theories of equitable relief which would bar the defense of the Statute of Limitations These principles are set forth in Naton v. Bank of California, 649 F.2d 691 (9th. Cir. 1981) as follows:

> ". . . harsh results [of the application of the Statute of Limitations] may be avoided through equitable modification of the limitation period."
> "Two kinds of equitable modification have been recognized: (1) equitable tolling, which often focuses on the plaintiff's excusable ignorance of the limitation period and on lack of prejudice to the defendant (citations); and (2) equitable estoppel, which usually focuses on the actions of the defendant (citations)"(Brackets ours.) (At 696.)

Point 1 of this Petition specifies the grounds for justifying the issuance of a Writ of Certiorari on the issue of estoppel of the Government to assert the defense of the Statute of Limitations. Point 2 concerns theories, other than estoppel, which would defer or toll the operation of the Statute of Limitations.

In determining the Petitioner's right to have his employment in Guam between May 23, 1947, and March 1, 1950,

be determined creditable employment for retirement purposes, the Board of Appeals of the Civil Service Commission erroneously failed to consider relevant evidence presented by petitioner which, if considered, would have resulted in a decision favorable to the petitioner. Point 3 specifies the grounds to justify the issuance of a Writ of Certiorari relating to this issue.

The order of the Court of Claims sustaining the defendant's Motion to Dismiss without leave to amend was contrary to the basic pleading rules established by both the District Courts and the Court of Claims. Point 4 specifies the grounds to justify the issuance of a Writ of Certiori, on this issue.

1. MAY MISSTATEMENTS BY AN AGENCY EMPLOYEE REGARDING THE APPEAL PROCEDURE TO BE FOLLOWED BY A CLAIMANT AFTER AN ADMINISTRATIVE DECISION BE "AFFIRMATIVE MISCONDUCT" SUCH AS TO JUSTIFY THE APPLICATON OF THE PRINCIPLE OF ESTOPPEL TO ASSERT THE DEFENSE OF THE STATUTE OF

LIMITATIONS AGAINST THE FEDERAL GOVERNMENT?

The basic issue in this Petition relates to the question of the proper procedure to be applied in determining whether or not estoppel may be applied against the government in a given situation.

Once the traditional rule prohibiting the application of estoppel against the Federal Government had been relaxed, the lower courts began the process of fashioning the rules relating to the determination of when and under what conditions estoppel would lie against the government. The history of the development of the estoppel principle is set forth in Thompson, Equitable Estoppel of the Government, 79 Columbia Law Review, Part 1, p. 550 (1979).

The courts that developed the estoppel principles took two different approaches in determining the critical elements which would give rise to the application of estoppel against the government. The original approach consisted of attempting to develop

specific categories of cases which would provide definite guidelines as to the types of situations in which estoppel would be permitted. One of the early attempts at formulating a specific category was based upon the nature of the activity performed by the government. If the government was acting in a proprietary capacity, it could be estopped, while if it was acting in its sovereign capacity, it was not subject to estoppel. It soon became apparent that this approach would not work. See United States v. Georgia-Pacific Company, 421 F.2d 92 (9th Cir. 1970). A number of other distinctions were formulated by the Circuit Courts, but which resulted in conflicting decisions between the various Circuit Courts.[2]

As an alternative to the attempt to

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[2]The areas of conflict between the decisions of the Circuit Courts is extensive. Most Districts allow estoppel against the government even though it is acting in its sovereign capacity, but the Court of Claims (Roberts v. United States,, 357 F. 2d 938 (Ct. Cl. 1966), and the United States Court of Customs and Patent Appeals (Air-Sea Brokers, Inc., v. United States, 596 F.2d 1008 (1978) refuse to apply estoppel against

formulate specific criteria, The Ninth Circuit developed a method of determining the question of estoppel that does not involve the creation of rigid categories, but involves the balancing of the unjust result of the government act (or other conduct giving rise to the claim that estoppel should be envoked) against the effect on the public interest.

The procedure set forth by the Ninth Circuit was articulated in the case of United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir 1973). After a review of some of the attempts to develop specific categories relating to the imposition of estoppel, the Court decided to base its

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the government when it is acting in its sovereign capacity.

Estoppel is not restricted to authorized acts of government agents in some circuits (Brandt v. Hickle, 427 F.2d 57 (9th Cir. 1970) and Portmann v. United States, 674 F.2d 1155 (7th Cir. 1982), while other courts refuse to apply estoppel for unauthorized conduct. (Goldberg v. Weinberger, 546 F.2d 477 (2nd Cir. 1976, and Bornstein v. United States, 345 F.2d 558 (Ct. Cl. 1965).

Other instances of conflict bewtween the Circuit Court decisions are listed in the Portmann, case, supra.

The Second Circuit is in agreement with the balancing procedure of the Ninth Circuit. See Portmann, supra.

decision on "elementary fairness." (at 989). The rationale was stated as follows:

> 'The Moser-Brandt-Schuster line of cases establish the proposition that estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel." (Citation) "This proposition is true even if the government is acting in a capacity that has traditionally been described as sovereign (as distinguished from propretary) although we may be more reluctant to estop the government when it is acting in this capacity." (at 989).

The result of the Lazy FC Ranch decision is to create a balancing between the injustice suffered by a person who relies upon misleading acts or conduct of a government official, and the impact on the public interest if estoppel is envoked.

As a result of the adoption of this balancing procedure, the Ninth Circuit has been placed in a position of conflict with the circuits that follow the specific category method of applying estoppel.

The recent case of Schweiker v. Hansen, 450 U.S. 785 (1981) , illustrates the difficulty in establishing fixed criteria for the application of estoppel. The Circuit court, in the case of Hanson v. Harris, 619 F.2d 942 (2nd Cir. 1980), reversed, 450 U.S. 785,had established a fixed category distinction, based upon a subtantive/procedural classification. This court reversed, specifically disapproving of such a classification (Schweikert v. Hansen, supra.)

This Court reaffirmed its determination that in order for the government to be estopped, there must be some "affirmative misconduct" on the part of the government official. Factually it was determined that such misconduct did not exist.

However, as was pointed out in the dissenting opinion, the Circuit Courts are in substantial conflict over what type of conduct will constitute such misconduct. (Schweikert v. Hansen, Supra, p. 791).

The opinion indicates that a

certain type of conduct by the government (i.e. informal statements regarding elgibility for Social Security benefits and failure to follow the appropriate manuals regarding the information to be given to applicants) do not constitute sufficient "affirmative misconduct" upon which estoppel may be based.

From the opinion it can be seen that mistaken over-the-counter advice to a potential claimant for benefits will not automatically constitute affirmative misconduct if the applicant may correct the action.

However, further statements by the Court give an indication that in the future a balancing test might be adopted by the court. The Court continued:

> "But at worst, Connelly's conduct did not cause respondent to take action, cf. Federal Crop Insurance Corp. v. Merrill, supra,, or fail to take action, cf. Montana v. Kennedy, supra, that respondent could not correct at any time." (at 789)

The above language raises the question of whether the same conduct by Mr. Connelly would be "affirmative

misconduct" if the conduct caused the claimant to take actions which could not be corrected and as a result suffered great detriment.

This dilemna could be resolved by the adoption of the Ninth Circuit balancing test where a determination of the issue of "affirmative misconduct" could be made within the basic structure of the overall determination of the issue of estoppel. The misconduct of the government would not be set forth as a separate item, but would be determined as a part of the whole transaction.

The emphasis would shift from defining specific acts that could be the subject of estoppel (ie., defined as "affirmative misconduct",) to analyizing the effect of the conduct and the impact of the application of estoppel on the applicant and the public interest.

The result in the Schweikert, case, supra, would be justified upon the basis that the harm to the claimant (loss of one year of past benefits, remediable as to the future benefits), is small in consideration to the effect on the public of making social security employees the

insurers of the accuracy of all information given to claimants, over the counter or otherwise.

By incorporating the determination of the type of misconduct as a part of the overall determination of the question of estoppel, it would not be necessary to develop a body of law specifying exact and specific categories of actionable misconduct.

The instant case presents a factual situation within the qualities set by Schweikert v. Hansen, supra. Because of the misinformation given to Petitioner (that there was no further appeal from the decision of the commission, but that the commission could reopen the decision upon the submission of new evidence) Petitoner did not file a suit for judicial review of the commission's action until after the statute of limitations had run. The result of the subsequent application of the statute of limitations is that Petitioner is foreclosed from bringing a judicial action to reverse the erroneous legal ruling regarding evidence made by the

Board of Appeals and, as a result, he is permanently and irrevocably deprived of approximately 20% of his retirement annuity for the balance of his life.

It is important to note that the above principles have developed regarding the types of cases in which estoppel will apply against the government. Each individual litigant will have to meet the individual elements of estoppel once it has been determined that the remedy is available in the situation. United States v. Georgia Pacific, 421 F.2d 92 (9th Cir. 1970).

Because of the existence of conflicts between the circuits on virtually every one of the specific principles, and the conflict between the circuits on the approaches to be taken in determining is estoppel is to be available in a given situation, it is submitted that a Writ of Certiorari should be granted to resolve the existing uncertainty.

2. MAY THE COMMENCEMENT OF THE RUNNING OF THE STATUTE OF LIMITATIONS BE DEFERRED ON GROUNDS OTHER THAN ESTOPPEL BECAUSE OF MISTATEMENTS BY GOVERNMENT OFFICIALS REGARDING THE APPELLATE PROCEUDRE TO BE FOLLOWED?

The ruling of the Court of Claims in granting the Government's Motion to Dismiss without leave to amend, constituted a holding that there are no factual situations in which the Government is either subject to equitable principles (such as equitable tolling), or that the statute of limitations may have been deferred for legally cognizable reasons. Such a ruling places the Court of Claims in a position that is in substantial conflict with the other circuits.

Petitioner contends that due to the importance of the establishment of a coordinated scheme for determining when the statute of limitations will not apply because of misrepresentations and other misleading acts of the government agents, a Writ of Certiorari should issue.

The following constitute different theories under which the statute of limitations will not bar a claimant who has been in some manner misled by the Government.

Equitable Tolling:

In the case of Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981) the Ninth Circuit applied the principle of equitable tolling between private litigants. In the Naton case, supra, the court said:

> "Equitable modification of the limitations period may be appropriate when misleaing conduct of the defendant has induced the plaintiff to delay filing notice of intent to sue". (at 696)

Thus, in Naton,,supra, the misleading conduct induced the plaintiff to fail to take a procedural step necessary to assert his or her contentions in the judicial process.

The Third Circuit has also recognized the principle of equitable tollingy in School District and City of Allentown v. Marshall 657 F.2d 16 (3rd Cir. 1981). The court, while not applying the doctrine under the facts of the case, held equitable tolling to be

applicable to a statute of limitations. The court, in considering the status of prior cases, reviewed the principles allowing tolling, stating:

> "[(1)]. The defendant has actually misled the plaintiff respecting the cause of action, [(2)] the plaintiff has in some extraordinary way been prevented from asserting his rights, or [(3)] the plaintiff has raised the precise statutory claim in issue, but has mistakenly done so in the wrong forum.".
> "We do not now decide whether these three categories are exclusive, but we agree that they are the principal situations where tolling is appropriate". (at 19, 20).

The principle of equitable tolling of the statute of limitations should be applicable where a claimant diligently seeks to follow the procedures outlined by the agency.

Denial of Due Process:

A second theory regarding misrepresentation of procedural steps is stated as an alternate theory in Brandt v. Hickel, 427 F2d 53 (9th Cir 1970). In the Brandt case, supra, the government official failed to notify the claimant of

a step in the process which affected the claimant's rights. While the specific issue involved the proper steps to be taken within the agency structure, the court stated a broader due process principle,

> "The due process clause requires that notice must be reasonably caluculated to inform parties of procedures which may directly and adversely affect their legally protected interests". (at 56)

The notification given to petitioner (App. H, p. A-26), in affirmatively stating that there was "no further right of appeal" misled petitioner. The statement was not limited to administrative appeal, but made a direct statement regarding <u>all</u> appeals. This was a seriously misleading statement.

The assertion of the Statute of Limitations in the circumstances is subject to challenge as a violation of due process of law.

<u>Deferral of Finality of Decision</u>:

Although the statute of limitations does not commence until an administrative procedure is final,the court of claims applys a special principle deferring, in certain circumstances, the application of

the statute of limitations by deferring the finality date of an administrative procedure. In Friedman v. United States, 310 F.2d 281 (Ct. Cl. 1962) the court surveys the principles it envokes regarding the statute of limitations. There the court stated:

> "(c). A Board's action (or failure to act) is not final if (i) the claimant has been misled, (ii) the board's decision is tentative and invites reopening , (iii) the armed service itself reopens the case, or (iv) there are other circumsances depriving the action or non-action of finality.

The correspondence between the Commission and the Petitioner wherein the Commission kept specifying the nature of the evidence necessary to obtain the only relief they informed Petitioner was possible, evidences the type of action on the part of the government that should defer the commencement of the statute until the agency gives a definite notice that all procedures are completed.

The conduct of the Commission falls within the quoted provisions of the Friedman case, supra.

3. DID THE CIVIL SERVICE COMMISSION COMMIT REVERSABLE ERROR IN REFUSING TO CONSIDER EVIDENCE FROM THE NAVY DEPARTMENT, FROM THE VARIOUS EMPLOYING OFFICERS AND THE PRIVATE CONTRACTOR SUBSTANTIATING THE DE FACTO STATUS OF PETITIONER AS A GOVERNMENT EMPLOYEE SOLELY BECAUSE THE FACE OF THE EMPLOYMENT AGREEMENT STATED THAT THE EMPLOYEE WAS EMPLOYED BY A PRIVATE CONTRACTOR?

The original decision mady the by the Board of Appeal of the Civil Service Commisssion (Appendix A, p.A-1) was based upon an erroneous legal decision regarding the evidence presented by the Petitioner to establish that he met the criteria for creditable government employment. The Commission determined that the only relevant evidence before it was the original contract of employment with a private contractor, and from that contract alone it determined that Petitioner was not a government employee for retirement purposes. The Board erroneously ruled that the evidence

presented by the Petitioner was not relevant.

In the original decision the commission did not specifically state that the reason that it would not consider the evidence was that it was bound by the face of the document, but based its decision on the claimed lack of supporting data presented by the claimant. This basis for the decision was not communicated to the Petitioner until October 30, 1978 (App. Y, p. A-60).

This failure to consider the supporting evidence is clearly an erroneous legal determination. Is is clearly established that contemporaneous transactions may properly be taken into consideration to ascertain the correct construction of a contract and relationship of the parties. United States v. Bethleham Steel Co., , 205 U.S. 105,(1906). Evidence to supplement the face of a contract is admissible to prove an actual agreement between the parties. Sylvania Electric Products, Ind., v. United States, 458 F2d 994 (Ct. Cl. 1972).

A virtually identical factual situation was presented in Jankovic v.

United States, 384 F.Supp 1355 (1974), where the Civil Service Commission refused to look beyond the face of a contract of employment (which stated the employee was an independent contractor), and refused to consider statements of the State Department that the employee was in fact an employee of the United States. The Court stated;

> "Obviously the BAR chose not to be guided by the findings and opinions of the employing agency, but chose to rely on form, ie., the literal language of the contract, rather that substance, ie. the performance of the contract." (at 1360)
>
> * * *
>
> "In the light of the foregoing, it is the Court's view that the CSC erred in its failure to give sufficient weight to the submission of the State Department particularly when read in the light of the Comptroller General report of June 30, 1960. The Court is led to the conclusion that when the whole record is considered there is not substanital evidence to support the narrow restricted holding of the BAR." (at 1361)

The District Court granted the employee's motion for a summary judgment and found that he was a government employee.

In spite of the 1974 ruling of the Court in Jankovic, supra, the Commission

continued to take the position that the face of the document controlls the substantive reality of the employment relationship of the government employee. The April 3, 1978, letter shows that the Commission continues to assert that the face of the document controls.

Petitoner contends that a Writ of Certiorary should issue in order to provide direction to the Civil Service Commission as to the nature of evidence that must be considered in making the determination of the employment status of a government employee.

4. THE COURT SHOULD GRANT CERTORARI IN THIS CASE AND REMAND IT TO THE UNITED STATES COURT OF APPEALS UPON ITS CREATION ON OCTOBER 1, 1982.

In entering the Order of Dismissal, especially without granting leave to amend, the Court of Claims committed substantial error of a type that is routinely recognized by an appellate court as reversable error.

The dismissal is, pursuant to the provisions of Court of Claims Rule 102(b), a final adjudication on the merits. As applied to the instant case, it is apparent that the legal principles applied by the Circuit Courts, and clearly set forth by this Court, establish that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief. Conley v. Gibson, 355 U.S. 41(1957).

Where a complaint in the District Courts is dismissed on the ground that it

fails to state a claim, the Courts have established the principle that leave should be granted to amend, if appropriate, and that the court should state the reason for the dismissal so that the complaint can be amended. Bonnano v. Thomas, 309 F.2d 320, 322(1962)

The factual positions set forth by the Petitioner in the Statement establish that if the facts stated therein are true, there is a ground for the application of estoppel, or one of the alternative remedies deferring the commencement of the limitations period, against the government. The failure of the Court of Claims to allow Petitioner the opportunity to litigte his contentions regarding a defense against the Statute of Limitations constitutes reversable error.

In addition, there is an additional reversable error committed by the Court of Claims. Petitioner raised the issue of the applicability of the "continuing claim" doctrine, which, under the principles adopted by the Court of Claims would only apply the Statute of Limitations against the Petitioner for

installments of his annuity accruing within the six year statutory period preceeding the filing of his Petition. The Court of Claims again dismissed the Petition without affording the petitioner the opportunity to establish factually the basis upon which the continuing claim exception would rest. Petitioner contends that the cases of Roberts v. United States, 151 Ct. Cl. 350 (1966),, and Friedman v. United States, 310 F.2d 477 (Ct. Cl. 1962), provide for the application of the continuing claim theory, and that the Court of Claims has erroneously applied the legal principles contained in the said cases so as to hold them inapplicable to the Petitioner's case.

As was previously pointed out in this Petition, there are substantial factual questions connected with the application of the legal principles presented by Petitioner in his original Petition in the Court of Claims, and the dismissal of his petition without leave to amend constitutes reversable error.

The above issues were presented to the Court of Claims in a Motion for Reconsideration after the original order

was rendered.

In the event that this Court determines that review by this Court on the merits is not appropriate, Petitioner requests that the Petition for Certiorari be granted, and the matter be remanded for further proceedings to the United States Court of Appeal for the Federal Circuit upon its creation on October 1, 1982, (pursuant to the provisions of 28 U.S.C. Section 1295(3), or transferred to the said court pursuant to the provisions of section 403(a) of the Federal Courts Improvement Act of 1982 (Public Law 97-164.

CONCLUSION

For the above reason, A Writ of Certiorari should issue to review the Order Granting the Motion To Dismiss entered by the Court of Claims.

Respectfully submitted,
DOUGLAS K. PATTON
415 Central Building
Oakland, CA 94612

WILLIAM T. LOWE
415 Central Building
Oakland, CA 94612

Counsel for Petitioner

August 27, 1982

APPENDIX "A"

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
Washington D.C. 20415

DECISION

IN THE MATTER OF)
Mr. Howard W. Waite) TYPE CASE:
CSA-1 162 441) Service Credit)

INTRODUCTION

The appellant has appealed from the decision of the Bureau of Retirement, Insurance, and Occupational Health that his employment in Guam under Navy Contracts NOy 13931 and NOy 13626 during the period of May 23, 1947, through February 28, 1950, is not creditable for Civil Service retirement purposes.

STATEMENT OF THE CASE

The appellant was last employed by the Department of Interior, Government of the Trust Territory, Saipan, Mariana Islands. His employment was terminated on April 18, 1968, by resignation (reduction in force). On the basis of 17 years and 2 months of creditable service, he was entitled to an annuity at age 62, which commenced August 11, 1969.

The official records show that the

appellant received an excepted appointment on March 1, 1950, as Engineer, GS-13, Officer-In-Charge of Construction, NOy Contracts, Guam, M. I. He seeks retirement credit for prior service performed between May 23, 1947, and February 28, 1950, when he was on the employment rolls of private contractors. In this connection in 1958 the Department of the Navy, Area Public Works Office Marianas, the appellant's employing agency, requested a ruling as to the creditability of the service in question. The agency stated that the appellant originally came to Guam as an Assistant Office Engineer (OICC) on May 23, 1947, with Brown-Pacific-Maxon, Contract NOy 13931, an on September 29, 1947, transferred to Blanchard and Maher, Frederic R. Harris, Keller and Gannon, Contracts NOy 13626, and the agency furnished copies of the employment contracts.

The Bureau advised the agency that the service as an employee of a contractor was not creditable.

In response to subsequent correspondence, the Bureau, by letter of January 30, 1963, advised the appellant

(who had asserted that his employment in May 1947 was through a CPFF contractor) that service performed by certain employees of the Navy Department paid on contractors' payrolls may be credited provided appointment by a Navy officer and assignment to duty on Navy work under a Navy officer was fully and completely documented. Under date of April 3, 1969, the Bureau advised Mr. Robert F. Kanost, Personnel Officer, Department of Interior, Trust Territory of the Pacific Islands, in which agency the appellant was then employed, that the Bureau had reviewed the statements furnished on behalf of the appellant but did not find that the fact of a federal appointment had been established; and had also reviewed the previously furnished contracts of employment and that they clearly indicated that the appellant was employed by the officers of the companies involved to fulfill Navy contracts under which companies were obligated to supply engineering personnel for duty with the Navy Department.

In letter of October 21, 1969, the appellant contended that he was recruited for the position by a government employee

and appointed by a federal officer and employed by another. In support thereof, he related that while inquiring about overseas employment in the offices of Brown-Pacific-Maxon in Los Angeles he was introduced to a Mr. John Willard, visiting personnel officer from the Navy's Office-in-Charge of Construction on Guam, and before being employed, he was further interviewed by Commander J. W. Gordanier, the Resident-Officer-in-Charge of Construction. The appellant stated that it was only after Commander Gordanier was satisfied that he could fill the position of Assistant Office Engineer on the staff of the OIC NOy 13931 was he sent to the San Francisco office of the contractor where he was signed on May 23, 1947, solely for transportation and pay purposes. Again copies of previously submitted statements from Captain Hansen and Theodore R. Shaid were presented. In reply of January 23, 1970, the Bureau reiterated that the statements did not establish the fact of a federal appointment, and that the fact he was hired to fill a specific position did not constitute an appointment or employment

by a federal officer.

REPRESENTATIONS TO THE BAR

On Appeal, the appellant contends that the contracts of employment were entered into solely for the convenience of the government, and in addition to the already mentioned statements, has furnished a statement from Captain Gordanier.

ANALYSIS AND FINDINGS

Civil service retirement credit for contract service depends on whether it meets the three tests of Federal employment. In this connection, in addition to the requirements that a person be engaged in the performance of federal functions under authority of an Act of Congress or Executive Order and be under the supervision and direction of a federal officer, there must be an affirmative showing that an appointing officer of a government department hired the person and placed him on the payroll of a contractor, rather than on the rolls of the government department, for the convenience of the government. Full and complete documentation of these elements is required.

The Board of Appeals and Review had

made a thorough study of the record in the appellant's case and has given careful consideration to his representations and evidence in support of his request that he be granted retirement credit for the service in question. The only documentation of the appellant's employment consists of the contracts of employment he entered into with the private contractors. The appellant's representations and the statements furnished on his behalf indicate that a federal officer authorized the contractor to employ the appellant to fill a particular position. "Authorization" does not satisfy the requirement that a person be appointed The Board finds as did the Bureau of Retirement, Insurance, and Occupational Health that the evidence does not establish that the Department of Navy appointed the appellant and then assigned him to the payrolls of the contractor for the convenience of the government during the period in question

DECISION

For the foregoing reason, the decision of the Bureau of Retirement,

Insurance, and Occupational Health denying retirement credit for contract service in this case is affirmed by the Board.

For the Commissioners

William P. Berzak
Chairman

July 22, 1970

APPENDIX "B"

IN THE UNITED STATES COURT OF CLAIMS

No. 470-81C

HOWARD WAITE)
v.)
THE UNITED STATES)

(Dated March 2, 1982)

ORDER

The plaintiff in this civilian pay case, a retired employee, contends that he is entitled to greater retirement pay than he has received because in calculating that pay the government failed to give him credit for two periods of federal service. He seeks the additional retirement pay that he contends he should have recieved and also payment for sick leave he forfeited upon retiring. The government has moved to dismiss on various grounds, including the bar of the statute of limitations.

We agree with the government that the claims based upon the failure to give the plaintiff credit for two periods of federal service are time-barred. We hold that the claim for unused sick leave does not state a valid claim for relief. Accordingly, we dismiss the

petition.

I.

The plaintiff retired from the federal service in August 1969. His annuity was computed on the basis of 17 years and 2 months of service. The plaintiff contends that his total service should have been 21 years and 10 months. The basis of this claim is that he also should have been credited for service between May 1947 and March 1950, and between June 1963 and March 1965. The Civil Service Commission denied the plaintiff credit for these two periods because it could not conclude that the plaintiff then was a federal employee.

Between 1947 and 1950, the plaintiff worked on Guam pursuant to an employment contract with a private firm. His employment was handled that was because when the Navy hired him in 1947, there were no procedures established on Guam for federal hiring of civilian employees. The gap in service between 1963 and 1965 covers a period between the termination of plaintiff's employment on American Samoa and his resumption of work on Saipan.

The plaintiff appealed the denial of

credit for 1947-50 to the Civil Service Commission, which in 1970 denied the appeal because of the lack of adequate documentation that the plaintiff was a federal employee during that period. The plaintiff's appeal did not challenge the denial of credit for the period 1963-65.

The plaintiff also seeks payment of unused sick leave, which he forfeited upon retirement. He points out that because of a change in the law, he would have received credit for the unused sick leave in calculating his annuity if he had delayed his retirement for approximately 3 months. He contends that the government should have informed him of that possibility.

II.

A. Section 2501 of Title 28 of the United States Code bars any claim within our jurisdiction unless the petition is filed within 6 years "after such claim first accrues". 28 U.S.C. Section 2501 (1976). "A claim against the United States first accrues on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action".

Oceanic Stemship co. v. United States, 165 Ct. Cl. 217, 225 (1964).

In the present case, all the events that fixed the liability of the United States occurred in 1969 and 1970 when, in calculating the plaintiff's annuity, the government excluded the plaintiff's service for the 1947-50 and 1963-65 periods, and did not give the plaintiff any credit for his unused sick leave. The plaintiff could have brought suit upon the claims at that time, and certainly after the Civil Service Commission denied his appeal in 1970.

The present suit, filed in July 1981, was initiated more than 10 years after the plaintiff's claims accrued. Section 2501 bars it as untimely. The fact that after 1970 the plaintiff wrote letters and submitted documentation to the Civil Service Commission in an attempt to persuade that agency to change its decision did not toll the statute. See Friedman v. United States, 159 Ct. Cl. 1, 24-25, 310 F.2d 381, 396 (1962), cert. denied, 373 U.S. 932 (1963).

B. The plaintiff argues, however, that under the "continuing claim"

exception to the statute of limitations, his claims are timely with respect to the additional amounts he asserts he should have recieved for the 6 years preceding the filing of his petition. We explained the narrow scope of that doctrine in Roberts v. United States, 151 Ct. Cl. 360, 363 (1960), and we pointed out that

> the purpose of the statute of limitations is not defeated or undermined in entertaining claims, the operative facts of which first occurred over six years ago, as long as the facts necessary to a determination of those claims are before us with certainty and not obscured by the dust of years.

We stated that the continuing claim exception properly applies where "there are no uncertain, undiscovered, or disputed facts" and the "resolution [of the case] depends only on an interpretation of the law and regulations as they existed at the time of plaintiff's retirement which are readily available to the court and the parties". Id.

Except for the claim relating to

unused sick leave, the plaintiff's claims do not come within the continuing claim exception. There are disputed questions of fact relating to the plaintiff's status during both periods for which the plaintiff was not given credit. They involve such issues as the authority of the naval officer who appointed the plaintiff in Guam in 1947 to place him in the civil service, the nature of his employment between 1947 and 1950 under his contract with the private contractor, and the duties, if any, he performed during the period 1963-65.

The answers to these questions depend upon the resolution of factual issues, the evidence on which goes back 35 years for the claim for the first period and almost 20 years for the second claim. These are precisely the kind of stale claims the statute of limitations was intended to bar and the continuing claim exception is inapplicable.

The claim based upon unused sick leave stands on a different footing. Although that claim is more than 30 years old, it involves no factual issues but

only a legal question.

The plaintiff, however, loses on the legal issue. At the time the plaintiff retired, the pertinent statutes and regulations did not provide either compensation or credit upon retirement for unused sick leave. Burich v. United States, 177 Ct. Cl. 139, 150, 366 F.2d 984, 990-91 (1966), cert denied, 389 U.S. 885 (1967). The fact that, approximately 3 months after the plaintiff retired, a new statute and regulations became effective that give credit for unused sick leave in calculating annuities does not entitle the plaintiff to additional compensation. The plaintiff's annuity properly was determined according to the law on the date of his retirement. The government was not required to advise the plaintiff that if he postponed his retirement his annuity would be increased to reflect unused sick leave. Nordstrom v. United States, 169 Ct. Cl. 632, 638, 342 F.2d 55, 59 (1965). The plaintiff has not stated a valid claim for recovery with regard to unused sick leave.

The defendant's motion to dismiss is granted, and the petition is dismissed.

BY THE COURT

Daniel M. Friedman
Chief Judge

APPENDIX "C"

Box 144
Inverness, CA 94937
October 21, 1969

Mr. Soloman Papperman, Chief
Legislative and Policy Division
Bureau of Retirement, Insurance and
Occupational Health
United States Civil Service Commission
Washington, D. C. 20415

Dear Mr. Papperman:

Thank you for your letter of October 9, 1969, enclosing the evidence of my early government service. I have made copies for my records and am returning the documents together with the following information:

1. While inquiring about overseas employment in the offices of Brown-Pacific-Maxon in Los Angeles, I was introduced to a Mr. John Willard, visiting Personnel Officer from the Navy's Office-in-Charge of Construction on Guam. Mr. Willard's sole job was to recruit personnel for the Navy and not for either the construction contractor (NOy 13931) or for the design contractor (NOy 13626).

2. Before being employed, I was

further interviewed by Cdr. D. W. Gordanier, then Resident-Officer-in-Charge of Construction (Contracts NOy 13931 and NOy 13626), whose offices were then in the Ferry Building, San Francisco. Only after Cdr. Gordanier was satisfied I could fill the position of Assistant Office Engineer on the staff of the OICC NOy 13931, (then Capt. Eigel L. Hansen), was I sent to the San Francisco office of Brown-Pacific-Maxon where I signed on May 23, 1947, their "contract" solely for transportation and pay purposes. I was recruited by a government employee (Mr. Willard), appointed by a federal officer (Cdr. Gordanier), and employed by another (Cdr. George Emery, CEC USN, who was directly under Capt. Hansen).

I hope the foregoing will explain the significance of the contracts, copies of which I had previously furnished for the purpose of establishing dates of initial employment for tenure purposes. In those early post war years the machinery of the Civil Service Department was inadequate for the intensive personnel demands of the government's

overseas programs. I know from rulings made under identical circumsances that my service from May 23, 1947, to March 1, 1950, is creditable. There is only the matter of furnishing sufficient documentation. Will you please advise me if further evidence or testimony is required.

Sincerely,
Howard W. Waite

Enclosure

APPENDIX "D"

Box 144
Inverness, CA 94937
January 5, 1970

Ref: CS - 162 441
528-24-0850
081107-06

Civil Service Bureau of Retirement
and Insurance
Washington, D.C. 20415

Gentlemen:

Please send me a copy of the computations used to determine my retirement annuity. I would also appreciate an opinion as to what my annuity would be had I applied for retirement after November 1, 1969, rather than of August 11, 1969.

Very truly yours,

Howard W. Waite

APPENDIX "E"

January 23, 1970

Mr. Howard W. Waite
Box 144
Iverness, CA 94937

Dear Mr. Waite:

This is in reply to your letter regarding retirement credit for service performed by you under Contract NOy 13931 and Contract NOy 13626.

We have given careful consideration to the statements submitted but do not see that the fact of a Federal appointment has been established. The contracts of employment previously furnished in your case indicate you originally went to Guam as an Assistant Office Engineer (OICC) on May 23, 1947, with Brown-pacific-Maxon, Contract NOy 13931 and on September 29, 1947, transferred to Blanchard and Maher, Frederick R. Harris, Inc., Keller and Gannon, Contract NOy 13626. You were continually so employed until March 1, 1950, at which time you were transferred to the civil service rolls as an Engineer, GS-13.

The contracts clearly indicate that

you were employed by the officers of the companies involved to fulfill Navy contracts under which the companies were obligated to supply engineering personnel for duty with the Department of the Navy. The fact that you were hired to fill a specific position does not constitute an appointment or employment by a Federal officer.

Since you were an employee of the contractors referred to in the contracts of employment from May 23, 1947, to March 1, 1950, retirement credit for the period in question may not be allowed.

If you believe that this action is not proper, you are, under the Commission's regulations, allowed six months from the date of this letter within which to enter an appeal. You may submit with your appeal any additional evidence which you think might support your appeal. A copy of the "Retirement Appeals Procedure" is enclosed for your information.

Sincerely yours,
Solomon Papperman, Chief
Legislative and Policy
Division

Enclosure

APPENDIX "F"

Box 144
Inverness, CA 94937
February 20, 1970

United States Civil Service Commission,
Board of Appeals
Washington, D.C. 20415

Gentlemen:

I am appealing the disallowance of my employment by the Officer in Charge of Construction, Guam from May 23, 1947 to March 1, 1950, as creditable for retirement purposes. The "contracts of employment" referred to in Enclosure 1 were entered into solely for the convenience of the Government, there being no organization in those early days following World War II whereby a Federal Officer, such as the Officer in Charge of Construction at an overseas office, could transport and place on his payroll an employee otherwise recruited as a civil servant. Note that Enclosure 2 certifies that I was personally recruited at the direction of the Officer in Charge of Construction, NOy 13931; and Enclosure 3 certifies that I was employed on the OICC staff. Enclosures 2 and 3 were available

prior to the disallowance of Enclosure 1. The Enclosure 4 certification was recently obtained from the Federal Officer who was the Resident Officer in Charge of Construction at the time in question. If further certification is needed to show that I was in fact specifically appointed by a Federal Officer, please so advise.

I claim credit for retirement purposes for my employment from May 23, 1947, to March 1, 1950.

Sincereley,
Howard W. Waite

Enclosures

APPENDIX "G"

Box 144
Inverness, CA 94937
September 4, 1970

United States Civil Service Commission
Board of Appeals and Review
Washington, D. C. 20415

Reference: CSA 1 162 441

Gentlemen:

For the following reasons I hereby reappeal for the service credit described in my letter of February 20, 1970:

1. The previous decision of the Bureau of Retirement, Insurance, and Occupational Health affirmed by your Board on July 22, 1970, contained the statement, "The fact that you were hired to fill a specific position does not consitute an appointment or employment by a Federal officer". Although no such requirement for creditable service was made by the Department of the Navy, Bureau of Yards and Docks when I made a pre-retirement inquiry many years ago, I proceeded to obtain what I understood to be adequate certification of the

"appointment or employment" requirement. Hence the certification I was " . . . recruited and employed by the Officer-in-Charge of Construction, NOy 13931 . . . ", submitted as Enclosure 4 in my February 20, 1970, appeal and resubmitted herewith as Enclosure 2.

2. Sometime after submitting my February 20, 1970, appeal, I was advised (by an ex fellow-employee whose similar service has been credited for retirement purposes), that the word "appoint" had more significance than the word "employed". I therefore obtained the statement from my appointing officer, Enclosure 3, but had no opportunity to submit this additional documentation before receipt of your decision of July 22, 1970.

In view of the added evidence (Enclosure 3) in my case, I hereby request a reversal of the Board's finding based on previous evidence, and claim credit for retirement purposes for my employment from May 23, 1947, to March 1, 1950.

Respectfully,
Howard W. Waite

Encl. 3

APPENDIX "H"

January 15, 1971

Mr. Howard W. Waite
Box 144
Inverness, CA 94937

Dear Mr. Waite:

This is in further response to your letter of September 4, 1970, requesting that the Civil Service Commisison reopen and reconsider your case which was decided by the Commission's Board of Appeals and Review on August 11, 1970.

Decisions of the Commission's Board of Appeals and Review are final administrative decisions of the Civil Service Commission, from which there is no further right of appeal. However,, it has been provided by regulation that the Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:

(a) New and material evidence is available that was not readily available when the previous decision was issued;

(b) The previous decision involves an erroneous interpretation of law or

regulation or a misapplication of established policy; or

(c) The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand, or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

We have carefully considered the information in your submission, including the statements of J. W. Gordanier, Captain, CEC, United States Navy, dated February 17, and June 30, 1970. These statements are not considered to represent new material evidence, not previously available, that your employment from May 23, 1947, to February 28, 1950, with Brown-Pacific-Maxon, and with Blanchard and Maher, Frederick R. Harris, Inc., and Keller and Gannon, constituted Government employment. As you point out, Captain Gordanier's latest statement is substantially the same as his prior statement except for a slight change in terminology. It is not satisfactory documentation that you were appointed as a Federal employee and placed on the rolls of the contractor for

the convenience of the Government.

In view of the above, and in the absence of any new evidence indicating probable error in the previous decision of the Board of Appeals and Review, the request to reopen this case must be, and is, denied.

I regret that I cannot furnish you a more favorable reply.

Sincerely yours,
Robert B. Bates
Assistant to the
Commissioners (Appeals)

APPENDIX "I"

1 April 1971

U. S. Civil Service Commission
Bureau of Retirement, Insurance
and Occupational Health
Washington, D. C. 20415

Gentlemen:

The following statement regarding employment of Mr. Howard W. Waite, DOB 11 August 1971, is furnished in support of subject's claim to establish eligibility for service credit for retirement.

Records and information available to this command indicate that on or about 23 May 1947, Mr. Waite was appointed by a Naval officer to perform work under U. S. Navy supervision. Contracts of employment which Mr. Waite entered into with Contractor NOy 13931, and later with contractor NOy 13626 on 29 September 1947, were effected for the convenience of the government to facilitate Mr. Waite being carried on the contractor's rolls for pay purposes only. Mr. Waite was continuously employed under the supervision of U. S. Navy officials until 1 March 1950, when he was converted to Civil Service status.

Favorable consideration of Mr.

Waite's request to credit the above period for retirement purposes is requested.

H. DAUBER
Personnel Services
Officer (Acting)

APPENDIX "J"

Box 144
Inverness, CA 94937
April 18, 1971

Re: CSA-1-162-441

United States Civil Service Commission
Washington, D. C. 20415

Gentlemen:

The attached statement from the Department of the Navy is submitted as new and material evidence not readily available at the time of your denial decision of January 15, 1971. If further documentation is required to establish the fact that my service with the United States Navy from May 23, 1947, to February 28, 1950, constituted government employment. Please advise and I will endeavor to furnish same.

Sincerely,
Howard W. Waite

Enclosure

APPENDIX "K"

10430 Greenview Drive
Oakland, CA 94605
March 6, 1972

Retirement Division
United States Civil Service Commission
Washington, D. C.

Gentlemen:

Re: Mr. Howard W. Waite
Box 144
Inverness, CA 94937

This letter is written in the interest of bringing to your attention what I consider an injustice on the application of the retirement pay of Mr. Waite, due in my opinion to an administrative error by the Personnel Department of the District Public Works Office, 14 N. D., Pearl Harbor.

Howard W. Waite was transferred from District Public Works Office, 8th Naval District to DPWO, 14th Naval District, on or about July 1, 1962, for the purpose of filling an engineering position in america Samoa under the then Governor Rex Lee. The intention was he be placed on the DPWO-14ND rolls to maintain his Civil Service employment tenure while on loan in Samoa as the then Samoan government

did not come under U. S. Civil Service employment regulations. Until mid-June 1962, I was the Officer in Charge of the DPWO-14ND office at which time I was transferred to Washington, D.C. I had interviewed Mr. Waite previously in San Francisco and explained how his employment would be handled. Soon after my departure, Mr. Waite reported to DPWO-14ND whicch was in a rather confused situation due to the disestablishment of that office and the personnel and functions being assumed by the Director, Pacific Division, Bureau of Yards and Docks, Pearl Harbor. At this point, it is understood this Command encountered personnel ceiling problems and through an administrative error Mr. Waite was changed to the category of an "excepted appointment" from "permanent appointment". This action resulted in a break in service as after about one year service in Samoa he later accepted a permanent Civil Service appointment with the Trust Territory Government in Saipan. Due to this break in service, he has suffered a loss in retirement benefits. I feel the Civil Service Commission should take the necessary action to

correct the obvious error and adjust the records accordingly.

Mr. Waite served the various Federal Agencies loyally and faithfully for over 22 years and I feel an injustice has been done because of an inadvertent administrative error.

The above outlined situation recently came to my attention since my recent retirement from the U. S. Navy.

Sincerely yours,
Norman M. Martinsen
Captain, Civil Engineer
Corps, USN (Retired)

APPENDIX "L"

March 16, 1972

Howard W. Waite
Box 144
Inverness, CA 94937

Dear Mr. Waite:

Reference is made to your Civil Service annuity and to your request for retirement credit for your service from May 23, 1947, through February 28, 1950, when you were on the employment rolls of private contractors.

Service performed while on a contractor's Cost-Plus-A-Fixed-Fee payroll has been ruled to be creditable for retirement purposes if it is shown that the individual received a Federal appointment and was placed on the contractor's payroll for the convenience of the Government. The fundamental question for consideration in determining creditability of this type of service is whether an employer-employee relationship existed between the Federal government and the employee, i. e. whether the employee met the tests as a Federal employee.

To be considered a Federal employee

a person must be:

(1) Engaged in the performance of Federal functions under authority of an Act of Congress or Executive Order;

(2) Appointed or employed by a Federal Officer in his official capacity as such; and

(3) Under the supervision and direction of a Federal officer.

In order to give further consideration to your request for credit for the service from May 23, 1947, through February 28, 1950, it will be necessary for you to submit three statements in affidavit form attessting to the fact that you were a Federal employee during the period in question. One of the affidavits about your employment must be from you personally. One of the other two affidavits must be from the Resident Officer in Charge, the Area Officer in Charge of construction, or some other Federal Officer having knowledge that you were Federally appointed.

An affidavit is a statement of facts

confirmed by the oath of the party making it, taken before an officer having authority to administer such oath.

Sincerely yours,
W. L. Schlappi
Chief of Section

APPENDIX "M"

March 21, 1972
Reference: RCZ:NO:1b
CSA 1 162 441

Mr. W. L. Schlappi, Chief of Section
United States Civil Service Commission
Bureau of Retirement, Insurance, and
Occupational Health
Washington, D. C. 20415

Dear Mr. Schlappi:

In response to your letter of March 16, 1972, there are attached three affidavits as follows:

1. Statement from me swearing to the nature of my employment between May 23, 1947, and February 28, 1950. (See attachment No. 4 for identification of my immediate supervisor as a Federal Officer.)

2. A statement by Capt. Eigel L. Hansen, the Officer in Charge of Construction of Cost-Plus-Fixed-Fee Contracts NOy 13931 and 13626 during the time of my above-mentioned service.

3. Statement from Capt. J. W. Gordanier, the ROICC for name contracts and time period.

Sincereley,
Howard W. Waite
Box 144
Inverness, CA 94937

4 attachments

APPENDIX "N"

April 5, 1972

Howard W. Waite
Box 144
Inverness, CA 94937

Dear Mr. Waite:

We have your letter of March 21, 1972, along with an affidavit from you and from Eigil L. Hansen concerning your contract service from 1947 to 1950.

We are returning the statement from J. W. Gordanier. Please advise Mr. Gordanier that his statement must also be sworn to before a notary. The notary's certification must appear on the statement.

Sincerely yours,
W. L. Schlappi
Chief of Section

APPENDIX "O"

Box 144
Inverness, CA 94937
August 25, 1972

United States Civil Service Commission
Bureau of Retirement, Insurance and
Occupational Health
Washington, D. C. 20415

Reference: RCZ:NO:1b
CSA 1 162 441

Attn: Mr. W. L. Schlappi

Dear Mr. Schlappi:

Please advise when I might expect action pursuant to my letter of May 3, 1972, in reply to yours of April 5, 1972, and prior correspondence. Also, please send me a copy of the detailed accounting, including dates and salary from which my retirement annuity was calculated.

Very truly yours,
Howard W. Waite

APPENDIX "P"

Box 144
Inverness, CA 94937
November 16, 1972

United States Civil Service Commission
Bureau of Retirement, Insurance, and
Occupational Health
Washington, D. C. 20415

Attn: Mr. W. L. Schlappi

Dear Mr. Schlappi:

Please advise me whether the decision that the sworn statements from Captains Gordanier and Hansen, submitted pursuant to your request of March 16, 1972, do not specifically show that I was appointed or employed by a Federal Officer in his official capacity as such and was under the supervision and direction of a Federal Officer, is yours, as Chief of Section, or is an official decision of the Civil Service Commission.

Also, please send me, or advise me from whom I should request, a copy of the accounting, requested in my letter of August 25, 1972.

Sincerely,
Howard W. Waite

APPENDIX "Q"

July 10, 1973

Howard W. Waite
Box 144
Inverness, CA 93947

Dear Mr. Waite:

I have your letter of June 14 with enclosure.

As indicated in previous correspondence, the secondary evidence required to establish creditability of service performed on a contractor's payrolls must be based on official documents or personal knowledge and conclusively show (1) the periods of employment, and (2) that the service met the three tests of Federal employment.

The affidavits you submitted from Captains Hansen and Gordanier do not specifically show that you were appointed or employed by a Federal officer in his official capacity as such and that you were under the supervision and direction of a Federal officer. The affidavits were substantially the same as those previously submitted and do not furnish any new evidence to show you met the three criteria of Federal employment.

Any additional new evidence you wish to submit will be carefully considered in connection with your claim; however, there is no authority to consider your "contractor" service as Federal employment on the basis of the information now available.

Sincerely yours,
W. L. Schlappi
Chief of Section

APPENDIX "R"

Box 144
Inverness, CA 94937
January 6, 1974

Civil Service Bureau of Retirement
and Insurance
Washington, D. C. 20415

Reference: CSA - 162 441
528-24-0850
081107-06

Gentlemen:

On January 5, 1970, and again on August 25, 1972, I requested information regarding the determination of my retirement annuity (copies attached).

To date, I have received no direct reply, but I have been informally advised by the former Director of Personnel, Trust Territory of the Pacific Islands, that I was penalized for time lost due to a technical break in service resulting from DPWO-14 ND action.

I reviewed this matter with Capt. Norman M. Martinsen who was OICC at the time I was transferred from the 8th ND to the 14th ND. A copy of his report to the Commission is attached.

I again request:

1. Copy of the acccounting by which

my retirement annuity was determined.

2. A statement as to whether I have been denied service credit due to the action outlined in Capt. Martinsen's letter (copy attached).

Very truly yours,
Howard W. Waite

APPENDIX "S"

Box 144
Inverness, CA 94937
May 28, 1974

United States Civil Service Commission
Bureau of Retirement, Insurance, and
Occupational Health
Washington, D. C. 20415

Reference: RCZ: NO: 1B
CSA 1 162 441

Attn: Mr. W. L. Schlappi

Dear Mr. Schlappi:

Since my letter to you of January 6, 1974, had not been acknowledged in the January 17, 1974, letter from your section, I thought further comments were forthcoming.

This letter is therefore to specifically call attention to the disparity between the total creditable service of 17 years and 2 months shown on the January 17, 1974, computation sheet and the facts, as explained by the letter from Norman M. Martinsen attached to my letter of January 6, 1974. (Additional copy attached herewith.) In his letter, Capt. Martinsen points out that as the then Officer-in-Charge of the 14th Naval District Public Works Office, I was to be

"placed on the DPWO-14ND rolls to maintain his (Howard W. Waite's) Civil Service employment tenure while on loan in Samoa as the then Samoan Government did not come under U. S. Civil Service employment regulation".

I entered U. S. Government employment on May 23, 1947, and was continuously in that status until April 17, 1969. At no time during that 21 plus year period did I have any other employment or income from any other source. Anything contrary to that status was either for the convenience of, or because of administrative errors by the Government. Such machinations ccaused me enough trouble at the time. Must I now be perpetually penalized for the Government's errors? When is the "merit" of the Merit System manifested?

With the 11 months of credited military time, my total creditable service should be 22 years and 9 months, not counting over 1400 hours of sicck leave and over 4000 hours of compensatory time acccumulated over thoše years for whicch I received nothing.

Very truly yours,
Howard W. Waite

Enclosure

APPENDIX "T"

June 11, 1974

Howard W. Waite
Box 144
Inverness, CA 93947

Dear Mr. Waite:

I have your letter of May 28.

We have again reviewed your file and find that based upon the facts in your case, you have been allowed the maximum benefit permissible under existing retirement law.

While you allege in excess of 21 years of service, your certified retirement records indicate creditable service totalling 17 years, 2 months, and 21 days as follows:

From	To	Years	Months	Days
2-17-31	2-4-32		11	18
3-1-50	7-7-50		4	7
9-17-50	7-15-63	12	9	29
3-22-65	4-18-68	3		27
		17	2	21

We are without authority to allow retirement credit for the additional service you claim because such service was not Federal and is not available for credit under the Civil Service Retirement System.

Sincerely yours,
For Chief of Section

APPENDIX "U"

March 19, 1975

Mr. Howard W. Waite
Box 144
Inverness, CA 94937

Dear Mr. Waite:

I have your inquiry of March 5.

The decision that the affidavits you submitted do not specifically show that you were a Federal employee from May 23, 1947, to Febraury 28, 1950, was made by the examiner who evaluated the evidence, and the decision was approved and upheld by Mr. W. L. Schlappi, Chief, Post Adjudication Section (L-Z).

Sincerely yours,

For Chief of Section

APPENDIX "V"

Box 144
Inverness, CA 94937
March 5, 1975

United States Civil Service Commission
Bureau of Retirement, Insurance, and
Occupational Health
Washington, D. C. 20415

Reference: CSA 1 162 441

Attn: Mr. Whitehead

Dear Mr. Whitehead:

Your February 20, 1975, reply to my letter of January 15, 1975, (requesting an answer to a question first raised on November 16, 1972) indicates you may have overlooked the basis for my question.

On April 18, 1971, I appealed the January 15, 1971, denial of my request to reopen my case. On March 16, 1972, the Chief of Section advised me, "I order to give further consideration to your request ... (you must)... submit three statements in affidavit form attesting to the fact that you were a federal employee during the period in question". These affidavits were submitted on March 21, 1972.

On April 5, 1972, the Chief of

Section requested that one of the statements have notary certification (The other two were already notarized.) This request was filled by my letter of May 3, 1972.

A letter from the Chief of Section dated October 18, 1972, states, "The affidavits . . . do not specifically show that you were appointed or employed by a Federal officer in his official capacity as such and were under the supervision and direction of a Federal officer. . ."

On November 16, 1972, I asked whether the decision that the affidavits "donot specifically show . . . proper appointment and supervision was made by the Chief of Section or by the Civil Service Commission. This is the question which has not yet been answered.

To set forth the question clearly:

Who specifically assumes the authority to claim that the swown statements submitted by my letter of March , 1972, and pursuant to the Chief of Section letter to me of March 16, 1972, do not specifically show that I was appointed or employed by a Federal Officer in his official capacity as such

and was under the supervision and direction of a Federal Officer during the period May 23, 1947, to February 28, 1950?

Very truly yours,

Howard W. Waite

APPENDIX "W"

December 22, 1976

Mr. Howard W. Waite
Box 144
Inverness, CA 94937

Dear Mr. Waite:

This is in reply to your letter of September 7, 1976, regarding documentation of Contract-Plus-a-Fixed-Fee service.

Service performed while on a contractor's Cost-Plus-a-Fixed-Fee payroll has been ruled to be creditable for retirement purposes if it is shown that the individual received a Federal appointment and was placed on the contractor's payroll for the convenience of the Government. Since many of the contracts between the contractor and the agency have been destroyed, secondary evidence may be considered in establishing credit for such service.

There is no prescribed wording required for the affidavits regarding such service. However, at least one of the affidavits must be signed by the Resident Officer in Charge; Area Office in Charge of Construction; or other Federal Officer

having knowledge that the individual was Federaly appointed. A contractor's statement that during the period of employment the claimant was an employee of the Navy or Army and not an employee of the contractor is also admissible evidence.

The primary consideration in evaluating such secondary evidence is whether or not it fully and completely documents the case in regard to establishing the necessary elements of employment; i. e. if the evidence conclusively shows the period of employment and that the service met the three tests of Federal employment, as outlined in your letter.

Sincerely yours,

Aurel V. Cissel
For Chief of
Section

APPENDIX "X"

April 3, 1978

Mr. Howard W. Waite
Box 144
Inverness, CA 94937

Dear Mr. Waite:

This is in further reply to Congressman John L. Burton's letter of December 16, 1977, in your behalf. I regret the delay in writing to you.

Congressman Burton has questioned why the recently submitted statement from Mr. George Keller, formerly a principal of one of the contracts under which you were employed during the period from May 23, 1947, to March 1, 1950, "is not germane in establishing Mr. Waite as a government employee during the time in question".

There is apparently some misunderstanding about the letter which Ms. Aurel V. Cisel wrote to you on December 22, 1976. That letter outlined procedures for submitting affidavits as secondary evidence in order to establish credit for Federal service. The letter was not an invitation for you to submit secondary evidence for our consideration,

however, but was in direct response to your written request of September 9, 1976, in which you specifically asked how such affidavits were to be prepared. The second paragraph of Ms. Cissel's letter points out that credit may be allowed for retirement purposes if it is shown that the individual received a Federal appointment and was placed on the contractor's payroll for the convenience of the Government. It went on to say since many of the contracts between the contractor and the agency have been destroyed, secndary evidence may be considered in establishing credit for such service.

The need for secondary evidence has never existed or been in question in your case. Instead, primary evidence (copies of Contracts NOy 13931 and NOy 13636) has been a part of your case file since 1958 and formed the basis of the Commission's original denial letter dated February 26, 1958. This denial of credit has been consistently reaffirmed.

Full consideration of the above-mentioned contracts, as primary evidence for verification of the Federal

nature of your employment, was taken by the Commission's Board of Appeals and Review, based on your appeal to that body, and resulted in their decision of July 22, 1970. The Board determined that:

"The only documentation of the appellant's employment consists of the contracts of employment he entered into with the private contractors. The apellant's representations and the statements furnished on his behalf indicate that a federal officer authorized the contractor to employ the appellant to fill a particular position. 'Authorization' does not satisfy the requirement that a person be appointed. The Board finds as did the Bureau of Retirement, Insurance, and Occupational Health that the evidence does not establish that the Department of Navy appointed the appellant and then assigned him to the payrolls of the contractor for the convenience of the government during the period in question".

Based on the request contained in your letter of September 4, 1970, a review of your case was performed by Mr. Robert B. Bates, Assistant to the Commissioners (Appeals). In the review, consideration was given to the statements of J. W. Gordanier, Captain, CEC, United States Navy, dated February 13 and June 30,

1970. However, as Mr. Bates explained in his January 15, 1971, letter, these statements were not considered to represent new material evidence, not previously available, that your employment from May 23, 1947, to February 28, 1950, (with Brown-Pacific-Maxon, and with Blanchard and Maher, Frederick R. Harris, Inc., and Keller and Gannon) constituted Federal employment. In view of this, and in the absence of any new evidence to indicate probable error in the previous decision of the Board of Appeals and Review, the request for reopening of your case was denied.

The statement of Mr. George Keller dated March 14, 1977, likewise, does not serve to overcome the primary evidence documented in your claim file (copies of Contracts NOy 13931 and NOy 13636). Therefore, you were advised on May 26, 1977, that it did not add anything that had not already been fully considered.

I am sorry that the facts in your case do not permit a favorable reply.

Sincerely yours,
Thomas A. Tinsley,Director

cc Honorable John L. Burton
House of Representatives

APPENDIX "Y"

October 30, 1978

Mr. Howard W. Waite
Box 144
Inverness, CA 94937

Dear Mr. Waite:

This is in reply to your letters of April 12 and September 15, 1978, in which you question the Commission's denial of civil service retirement credit for your employment with Brown-Pacific-Maxon and with Blanchard & Maher/Frederic R. Harris, Inc./Keller & Gannon, under Contracts NOy-13931 and NOy-13626.

On June 8, 1978, we sent you copies of the "Contract of Employment" executed by you under each of the contracts involved. You will notice that in the employment cntracts, you are referred to as the "employee" and the individual contractors are referred to as the "employer". We find nothing in these documents which would indicate that you were an employee of the Department of the Navy, or that you were to accrue any benefits from the U. S. Government based on that service.

Regarding the statement in the last paragraph of your April 12 letter, it should be noted that "documentation" means the supplying of written or printed papers bearing the original, official, or legal form of something, which can be used to furnish decisive evidence or information. The use of the words "the only documentation" in the Appeals Review Board's July 22, 1970, decision referred to the copies of your employment contracts executed many years ago (1947). These documents constitute primary evidence of your employment. The affidavits and letters which you have sent to us since your retirement in 1970 are "secondary" evidence, and cannot overcome the "primary" evidence (the 1947 contracts) contained in your file.

Sincerely yours,

Craig B. Pettibone,
Chief Office of Policy
Development and
Technical Services

APPENDIX "Z"

August 8, 1979

Mr. Howard W. Waite
Box 144
Inverness, CA 94937

Dear Mr. Waite:

This is in reply to your letters of November 7, 1978, and May 10, 1979, regarding disallowance of civil service retirement credit for service you performed for private contractors between May 23, 1947, and February 28, 1950.

There is no prescribed wording or exact text to be used in an affidavit which is submitted as secondary evidence for consideration of whether or not an individual received a federal appointment and subsequently was placed on a contractor's payroll for the convenience of the Government. However, the contents of the affidavit must establish, to the satisfaction of the Office of Personnel Management (formerly the Civil Service Commission), that the necessary elements existed to prove that the individual was a federal employee. The person executing the affidavit is required to describe in detail how he or she had personal

knowledge of the conditions under which the alleged employment was performed, the exact beginning and ending dates of the employment, and the reasons why they believe the employment met the three tests of federal employment, i. e., appointed in the civil service by a federal officer or employee acting in his official capacity, engaged in the performance of a federal function under authority of law of an Executive act, and subject to the supervision of a federal officer or employee while engaged in the performance of the duties of the position. (5 U.S.C. 2105(a)).

The Board of Appeals and Review affirmed the disallowance of service credit in your case on July 22, 1970, and Mr. Robert B. Bates, Assistant to the Commissioners (Appeals), denied your request to reopen and reconsider the case on January 15, 1971. As to the significance of Mr. Schlappi's March 16, 1972, letter to you, this letter was prepared at the same time we were reviewing several similar cases to be sure that the criteria for establishing secondary evidence were uniformly

applied. No affidavits were received from you, however, either in response to the 1972 letter or at any subsequent time, which contained new or material evidence to form a basis for reopening and reconsidering your claim.

Sincerely yours,

Craig B. Pettibone,
Chief Officer of
Policy Development
and Technical Services

Office - Supreme Court, U.S.
FILED
DEC 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-376

In the Supreme Court of the United States

OCTOBER TERM, 1982

HOWARD WAITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL ~~COURT~~ CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner's claim that he is entitled to additional years of credit on his civil service retirement account is barred by the statute of limitations.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-376

HOWARD WAITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)[1]

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION

The order of the Court of Claims (Pet. App. A-8 to A-15) is not reported. The decision of the Civil Service Commission Board of Appeals and Review (Pet. App. A-1 to A-7) also is not reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 2, 1982, and a petition for reconsideration was denied on April 2, 1982. On June 16, 1982, the Chief Justice extended the time in which to file a petition for a writ of certiorari to August 30, 1982, and the petition was filed on that date.

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[1]The Court of Claims' appellate functions were merged into the functions of the new United States Court of Appeals for the Federal Circuit effective October 1, 1982. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, 37-38, 57.

STATEMENT

Prior to his retirement in 1969, petitioner was a civilian employee of the Department of the Navy. In 1947, when petitioner was initially recruited by the Navy in Guam, there were no procedures established for the federal hiring of civilians on Guam. Accordingly, petitioner worked pursuant to employment contracts with private firms. In 1950, a Civil Service facility was established on Guam and petitioner was appointed to a federal position, which he held until June 15, 1963. From that date until March 22, 1965, petitioner was employed by the Government of American Samoa. Thereafter, petitioner served as a federal employee until his retirement in August 1969. When the Civil Service Commission computed petitioner's retirement pay, it did not give him credit for the periods 1947-1950 or 1963-1965 because it could not conclude that he had been a federal employee during those periods of time. Pet. App. A-9.

On January 23, 1970, the Bureau of Retirement, Insurance and Occupational Health of the Civil Service Commission denied petitioner's request for retirement credit for the period 1947-1950 (Pet. App. A-1, A-20 to A-21).[2] On July 22, 1970, the Civil Service Commission Board of Appeals and Review (now the Merit Systems Protection Board) (the "Appeals Board") affirmed on the ground that the evidence did not establish that petitioner was a federal employee during the period in question (*id.* at A-1 to A-7). The Appeals Board subsequently denied petitioner's request for reopening and reconsideration of his case (*id.* at A-26 to A-28). Petitioner continued to correspond with the Commission between 1971 and 1979, without obtaining satisfaction (Pet. 4-5; Pet. App. A-29 to A-64).

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[2]Petitioner had not sought review of the denial of credit for the period 1963-1965. See Pet. App. A-1, A-9 to A-10.

On July 30, 1981, petitioner filed this action in the Court of Claims seeking retirement credit for the 1947-1950 and 1963-1965 time periods.[3] The Court of Claims rejected this claim as barred by the six-year statute of limitations contained in 28 U.S.C. 2501, holding that all the events necessary to fix the liability of the United States occurred in 1969 and 1970 when the government excluded petitioner's service during 1947-1950 and 1963-1965 from its calculation of his annuity. The court further observed that although petitioner certainly could have brought suit after the Civil Service Commission denied his appeal in 1970, in fact suit was not filed until more than 10 years after petitioner's claims first accrued. The court also noted that petitioner's post-1970 efforts to persuade the Civil Service Commission to change its decision did not toll the statute, citing *Friedman* v. *United States*, 310 F.2d 381, 396 (Ct. Cl. 1962), cert. denied *sub nom. Lipp* v. *United States*, 373 U.S. 932 (1963). Pet. App. A-11.

In addition, the Court of Claims rejected petitioner's argument that his claims come within the "continuing claim" exception to the statute of limitations (Pet. App. A-12 to A-13). The court relied (*id.* at A-12) on *Roberts* v. *United States*, 151 Ct. Cl. 360, 363 (1960), as authority for "the narrow scope of that doctrine," which is applicable only to cases in which " 'there are no uncertain, undiscovered, or disputed facts' " (Pet. App. A-12). Because, the court found (*id.* at A-13), there are disputed questions of fact concerning petitioner's status during both periods of time for which he was not given credit, it concluded (Pet. App. A-12) that "[t]hese are precisely the kind of stale

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[3]Petitioner also sought payment for unused sick leave, which he forfeited upon retirement. The Court of Claims denied this claim on the merits (Pet. App. A-14), and petitioner is not seeking review of that aspect of the decision below.

claims the statute of limitations was intended to bar and the continuing claim exception is inapplicable."

ARGUMENT

The Court of Claims correctly applied settled law, and its decision presents no conflict with any decision of this Court or any court of appeals. Further review by this Court therefore is not warranted.

1. Petitioner's "basic" contention (Pet. 21-30) is that the government should be estopped from asserting the statute of limitations as a defense, because alleged "affirmative misconduct" on the part of the Civil Service Commission induced him to delay filing suit in federal court. But petitioner did not raise this estoppel argument below and he therefore should not be permitted to press it here. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958). In any event, the argument is without merit.

The alleged "affirmative misconduct" is nothing more than the Commission's January 15, 1971 letter denying petitioner's request for reopening and reconsideration of his case (Pet. App. A-26 to A-29). Specifically, petitioner contends (Pet. 29-30) that the letter misrepresented his appeal rights by stating that the Appeals Board's decision was final and that "there is no further right of appeal," but that the Commission could reopen the decision if new evidence were submitted.

The statements of which petitioner complains were made in the following context (Pet. App. A-26 to A-27):

> Decisions of the Commission's Board of Appeals and Review are final administrative decisions of the Civil Service Commission, from which there is no further right of appeal. However, it has been provided by regulation that the Commissioners may, in their

> discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:
>
> (a) New and material evidence is available that was not readily available when the previous decision was issued * * *.

Applying this standard, the Commission concluded (*id.* at A-28) that the materials petitioner had submitted did not warrant reopening. Read in context, the Appeals Board's statements were not misleading. Accordingly, they do not constitute affirmative misconduct under *Schweiker* v. *Hansen*, 450 U.S. 785 (1981).

The unambiguous import of the quoted statements is that the decision of the Appeals Board is the final decision *of the Commission* and that no further *administrative* review is available to petitioner. This is clear not only from the express language of the statement—"[d]ecisions of the Commission's Board of Appeals and Review are final *administrative* decisions" (emphasis added)—but also from the context in which the statements were made—in response to petitioner's request for reopening and reconsideration *by the Commission* (see Pet. App. A-24 to A-25). Moreover, petitioner cannot show that the statements of the Commission or the lack of affirmative notification of the availability of judicial review caused him to "fail to take action, cf. *Montana* v. *Kennedy*, [366 U.S. 308, 314-315 (1961)], that [he] could not correct at any time." *Schweiker* v. *Hansen*, *supra*, 450 U.S. at 789. Just as the statements of the Social Security Administration field representative in *Schweiker* v. *Hansen*, *supra*, did not prevent the claimant there from filing a written application for benefits, the Civil Service Commission's statements to petitioner did not prevent him from filing suit. The most that can be said is that those statements encouraged petitioner to attempt to persuade

the Commission to reopen and reconsider a decision that it had clearly stated was final. Accordingly, this case is governed by the principles announced in *Schweiker* v. *Hansen*, *supra*. See also *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982), slip op. 3-5.[4]

2. Petitioner also claims (Pet. 33) that the principle of "equitable tolling" should be applied "where a claimant diligently seeks to follow the procedures outlined by the agency." Both of the cases on which petitioner relies (Pet. 32-33), however, concerned federal provisions limiting the time within which a complainant must file an administrative notice of intent to sue a third party. In both cases, the courts held that such limitations periods are not jurisdictional, and therefore are subject to equitable modification. *School District of Allentown* v. *Marshall*, 657 F. 2d 16, 18 (3d Cir. 1981); *Naton* v. *Bank of California*, 649 F. 2d 691, 695-696 (9th Cir. 1981). Moreover, in neither case was the party whom the plaintiff sought to sue the United States or a federal agency. Accordingly, the cases cited by petitioner have no application to the statute of limitations involved here, 28 U.S.C. 2501, which is jurisdictional in nature and which represents a waiver of sovereign immunity. See, *e.g.*, *Kirby* v. *United States*, 201 Ct. Cl. 527, 539 (1973).

Indeed, the Court of Claims has repeatedly held that resort to permissive administrative remedies does not toll the running of the statute, because in those cases Congress "has [not] interposed an administrative tribunal between the claimant and the court." *Friedman* v. *United States*, *supra*, 310 F. 2d at 385, 388, 396; see also *Kirby* v. *United States*, *supra*, 201 Ct. Cl. at 531. Here, petitioner's attempts to gain reconsideration by the Commission were merely

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[4]Petitioner's "due process" argument (Pet. 33-34) merely restates his estoppel claim. It too was neither presented to nor decided by the Court of Claims.

permissive avenues of review. Accordingly, the Court of Claims correctly held (Pet. App. A-11) that the fact that petitioner wrote letters and submitted documents to the Civil Service Commission after 1970 in an attempt to persuade that agency to change its decision did not toll the statute.

3. Finally, petitioner contends (Pet. 34-35) that his post-1970 correspondence with the Commission operated to defer the finality of the Commission's prior adverse decision. This claim also lacks merit.

In *Bruno* v. *United States*, 556 F.2d 1104 (1977), the Court of Claims elucidated the deferred finality principles it had previously enunciated in *Friedman* v. *United States*, *supra*, on which petitioner relies (Pet. 35). The court explained *Friedman* as holding only that

> where the [administrative board] itself suggests in its findings that the decision is tentative, or where the [board] witholds a final decision pending consideration of some new evidence, or expressly invites, on the record, the petitioner [to] seek a reopening at some later date, then, as a matter of law, the [board] decision is not final and the statute of limitations does not begin to run. Absent such circumstances, the decision is final and the statute of limitations period begins to run.

556 F. 2d at 1106. The statements made by the Commission fall far short of these criteria. The Commission's January 15, 1971 letter to petitioner stated unambiguously that the Appeals Board's decision was final (see page 4, *supra*). The further recital that regulations granted the Commission discretion to reopen and reconsider prior decisions under certain exceptional circumstances was merely a prelude to the Commission's conclusion (Pet. App. A-28) that the material submitted by petitioner did *not* warrant reopening;

it certainly did not suggest that the decision rendered in petitioner's case was tentative or expressly invite petitioner to seek reopening at some later date.Nor did any subsequent communication to petitioner by the Commission do so (see *id.* at A-35 to A-37, A-39, A-42 to A-43, A-48 to A-50, A-54 to A-64). Accordingly, there is no basis for deferring the finality of the administrative decision challenged by petitioner.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1982

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[5]Petitioner's final contention (Pet. 36-39) consists of an argument on the merits, which the Court of Claims did not reach since it held that petitioner's claim was barred by the statute of limitations.

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No. ~~A-1076~~
82-376

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HOWARD WAITE, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

REPLY TO THE RESPONDING BRIEF OF THE UNITED STATES.

ARGUMENT

1. In its responding brief the United States is incorrect in its assertion that the issue of estoppel was not raised in the Court of Claims. (Res. 4).

The issue of the government being barred from asserting the statute of limitations was directly briefed in the Plaintiff's Motion To Reconsider (RULE 151) presented to the Court of Claims. The motion was based upon the proposition that the Petitioner should be allowed to amend to plead the facts relating to the inapplicability of the Statute of Limitations.

In the Motion to Reconsider[1] the following language is appropriate to support the position of the Petitioner:

> "Plaintiff submits that the petition should not be dismissed, but that the issues relating to the inapplicability of the statute of limitations be the subject of factual determinations by the Court."(p.2)
>
> * * *
>
> "This statement in the Friedman case, supra, is a recognition of the basic rule of jurisprudence that one party cannot lull an opposing party past the statute of limitations by continuing negotiations which lead toward a resolution of the action."
>
> "The documents attached as exhibits establish that both the

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[1] The record from the Court of Claims has been certified by the lower court, and is on file in the Supreme Court.

> first and second reasons given in Friedman, supra, are present. The Plaintiff was misled by the commission into believing that his application was still open for resolution, although the government did not, as hereinafter stated, intend to act upon the evidence submitted by Plaintiff. (Motion, p. 2-3).

The relevant letters attached to the Appendix in this matter were attached to the Motion for reconsideration, and the acts constituting the actions of the government relied upon by the Plaintiff were argued in the brief. The Plaintiff offered to provide proof at the trial as follows:

> "The evidence at the hearing will develop a continued exchange of correspondence between the parties. During this time the government was conducting itself in such a manner to induce the Plaintiff to understand that if he submitted the necessary documentation that his claim would be considered favorably." (p. 4).

The issue of estoppel to assert the statute of limitations because of the conduct of the government was expressly presented to the Court of Claims in the Motion for Reconsideration.

2. The remaining arguments contained in the Opposition Brief filed by the United States discuss the merits of the Petitioner's claim, but do not treat the issues germain to this Petition for Writ of Certiorari.

The Respondent has not presented any argument concerning the conflicting decisions between the various circuit courts and other federal courts regarding the application of the doctrine of estoppel against the United States Government. The thrust of the Respondent's argument is that the case was correctly decided under the law established in the Court of Claims. This argument entirely begs the question of the substantial conflicting decisions among the various circuits.

3. The Respondent has incorrectly stated (Res.8, footnote 5) that the Petitioner's third contention (Pet. 36-39) is an argument on the merits. The cases cited by Petitioner in the Petition establish a conflict between the Court of Claims and District Court of the District of Columbia District. This conflict is a separate ground for the issuance of a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 15, 1982